

Legislative Bulletin.....April 29, 2009

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H.R. 1913 – Local Law Enforcement Hate Crimes Prevention Act of 2009

H.R. 1913 — Local Law Enforcement Hate Crimes Prevention Act of 2009 (*Conyers, D-MI*)

Order of Business: The bill is scheduled for consideration on Wednesday, April 29, 2009, under a closed rule which provided for a substitute amendment (*Conyers*) which was included with the passage of the rule. The [rule](#) waives all points of order against considering the bill (except those for PAYGO and earmarks), and provides for one hour and twenty minutes of general debate.

The substitute amendment does the following:

- Clarifies that the bill covers tribal lands.
- Extends from 30 days to 180 days the period for the Attorney General to approve or deny applications for grants to cover expenses related to state, local, and tribal investigation and prosecution of hate crimes.
- Clarifies that offenses committed with dangerous weapons can be considered hate crimes.
- Clarifies that those that engage in prohibited conduct in the special maritime or territorial jurisdiction of the bill shall be covered.
- Clarifies that the District of Columbia, Puerto Rico, and other territories and possessions are covered jurisdictions.
- Puts in place a statute of limitations of seven years except in crimes involving death.

Summary: H.R. 1913 would make certain “hate crimes” new federal offenses – including crimes motivated by “sexual orientation and gender identity” (not defined in the bill). The bill would also create two new federal grant programs to assist state and local governments in investigating and prosecuting hate crimes, and require expanded data collection and reporting for hate crimes, among other provisions. The specific provisions of the bill are as follows:

- Defines “hate crime” as having the meaning in 28 U.S.C. 994 (within the Violent Crime Control and Law Enforcement Act of 1994; P.L. 103-322):

a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person

Note: The terms sexual orientation and disability are not explicitly defined in the bill. The term gender identity is defined as “*actual or perceived gender-related characteristics*” which is so vague that it could be interpreted in many ways.

- Authorizes the U.S. Attorney General (AG), at the request of any state, local, or tribal law enforcement agency, to provide technical, forensic, prosecutorial, or any other type of assistance in the investigation and prosecution of any violent felony that is motivated by “prejudice based on the actual or perceived race, color, religion, national origin, gender, *sexual orientation, gender identity, or disability* of the victim **or is a violation of the state, local, or tribal hate crime laws.**” (emphasis added)

Thus, this provision provides federal assistance for any violent felony based on the federal definition of hate crimes, as well as any violation based on any one of the state hate crime definitions. As of December 2007, according to the [Anti-Defamation League](#), 45 states and the District of Columbia have some variation of hate crimes laws.

- Requires the AG to give priority to crimes committed by offenders who have committed crimes in more than one state, and to rural jurisdictions that have “difficulty covering the extraordinary expenses” (not defined) relating to the investigation or prosecution of the hate crime.
- **Creates new federal grant program.** Authorizes the AG to award federal grants to state, local, and Indian law enforcement agencies for “extraordinary expenses” (not defined) associated with the investigation and prosecution of hate crimes.
- Requires the Office of Justice Programs (under the Department of Justice – DoJ) to work closely with grantees to “ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.”
- Stipulates grant application requirements, including a statement from potential grantees on the “extraordinary purpose” (not defined) of the grant and a certification that the government entity lacks the resources to investigate or prosecute hate crimes. The AG is required to approve or deny the grant application within 180 business days (changed from 30 days by the Conyers substitute amendment) of receipt of the application, and provide a report to Congress detailing all grant applications and awards. Authorizes \$5 million to be appropriated for FY2010 and FY2011.
- **Creates new federal grant program.** Authorizes the Office of Justice Programs to award grants to state, local, and tribal governments for programs designed to combat hate crimes committed by juveniles – including programs to train local

- law enforcement officers in “identifying, investigating, prosecuting, and preventing hate crimes.” Authorizes *such sums as may be necessary* to be appropriated to carry out this provision. (emphasis added)
- Authorizes such sums as may be necessary (to the Treasury Department and DoJ) to increase the number of personnel to prevent and respond to alleged violations of hate crimes (18 U.S.C. 249), as expanded under this bill.
 - Makes certain hate crimes new federal offenses and subject to certain maximum prison sentences and fines:
 - whoever causes or attempts to cause bodily injury to a person because of actual or perceived race, color, religion, or national origin, will be sentenced to a prison term of up to 10 years, fined, or both; and
 - if the offense results in death or includes kidnapping or attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or attempted murder, the offender may receive up to a life sentence in prison.
 - Makes certain hate crimes new federal offenses and subject to certain maximum prison sentences and fines *in instances involving interstate commerce (where the defendant has crossed a state or national border, or uses a weapon that has crossed such border, in conjunction with the offense)*:
 - whoever causes or attempts to cause bodily injury to a person because of actual or perceived religion, national origin, gender, *sexual orientation, gender identity or disability*, will be sentenced to a prison term of up to 10 years, fined, or both; and
 - if the offense results in death or includes kidnapping or attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or attempted murder, the offender may receive up to a life-sentence in prison. (emphasis added)
 - Stipulates that no prosecution may be undertaken by the U.S. unless certified in writing by the AG or appropriate designee that:
 - a) the certifying individual has reasonable cause to believe that bias (against one of the above mentioned categories) was a motivating factor underlying the conduct of the defendant; and
 - b) state or local law enforcement officials have been consulted and determined that:
 - 1) the state does not have jurisdiction or does not intend to exercise jurisdiction,
 - 2) the state has requested that the federal government assume jurisdiction,
 - 3) the state does not object to the federal government assuming jurisdiction, *or*

4) the verdict or sentence obtained (based on the state charges)
“left demonstratively unvindicated the federal interest in eradicating bias-motivated violence.” (emphasis added)

- ***Defines “gender identity” to mean “actual or perceived gender-related characteristics.”*** The definition of “gender identity” includes the word “gender” and also states that the meaning could be “actual” or “perceived.” As such, it is not clear from this “definition” what the bill authors intend for gender identity to mean or how it should be construed in law. (emphasis added)
- States the following rule of evidence for court proceedings: “In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, ***unless the evidence specifically relates to that offense.*** However, nothing in this section affects the rules of evidence governing impeachment of a witness.” (emphasis added)
- Includes a severability clause, stating that if one part or provision of the Act is found unconstitutional, the remaining provisions will not be affected.
- States the following rule of construction: “Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit any expressive conduct protected from legal prohibition by, or any activities protected by the Constitution.”

Note: Since this disclaimer states the obvious, namely that the First Amendment is still in effect and that the bill does not prohibit “any activities protected by the Constitution,” the disclaimer has the appearance of strengthening free speech while not substantively providing any additional protections. Since this disclaimer does not expressly state any specific actions that would be protected under the Constitution (i.e. – the First Amendment right to free speech and the ability to publicly denounce homosexual behavior as a sin or placing an advertisement that includes Biblical verses that condemn homosexual behavior on a public billboard), it has no net effect. Thus, religious leaders promoting traditional morality could be made subject to investigation. As the Minority states in their views in the Committee report, “...the bill raises the possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech or protected activities.” The report goes on to say, “Ultimately, a pastor’s sermon concerning religious beliefs and teachings could be considered to cause violence and will be punished or at least investigated.”

Additional Background: Following a prolonged public debate regarding “hate crimes” in the 1980s, and specifically focusing on the question of whether incidents of violent crime motivated by specific hate toward one group was on the rise or not, Congress passed the Hate Crimes Statistics Act in 1990. This Act required the Attorney General to collect data “about the crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity” for certain violent crimes. Congress amended this law in 1994 to include “disability” as well, and required the AG to publish data annually. The

AG tasked the FBI with compiling and publishing this information as part of the Uniform Crime Report (UCR) program, and hate crime statistics have been compiled, based on information voluntarily submitted by the states, since 1991.

In 1994, Congress defined “hate crime” (see Summary for definition) and required the U.S. Sentencing Commission to create guidelines to provide sentencing enhancements for hate crimes. Since then, several other federal laws have been enacted that relate to or expand federal hate crime law, including the Violence Against Women Act and the Church Arson Prevention Act. In addition, Congress provided funding for hate crimes prevention in the 2001 passage of No Child Left Behind and has appropriated funding to provide anti-hate crime training to state and local law enforcement agencies.

Possible Conservative Concerns: As noted in the Summary, sexual orientation and disability are not defined in the bill or in current law. Gender identity is defined so vaguely as to have little meaning. Within legislation that expands federal powers and provides federal grant money to investigate and prosecute state and local violent crimes, some conservatives may be concerned by the nondescript bill language and terminology.

The American Psychiatric Association’s publication entitled *Diagnostic and Statistical Manual of Mental Disorders*, lists autogynephilia, coprophilia, necrophilia, pedophilia, transsexual, transvestite, zoophilia, and many others as types of sexual orientations. As such, these same groups may be covered by H.R. 1913. Thus, a violent crime against an individual that is targeted because he is a transsexual or a necrophile may be investigated, prosecuted, and sentenced more harshly than an identical violent crime against a pregnant woman or a police officer.

In addition, as noted above, those entities that have been subject to prosecution and threats under state hate crime laws (typically religious leaders promoting traditional morality) may be subject to potential criminal liability under this bill, as prosecutors blur the line between what constitutes a “hate crime” and what they *deem* hate speech (see Free Speech section below).

Examples of free speech prosecuted under hate crime laws:

- In Philadelphia, 11 Christians were arrested and jailed overnight in 2004 for singing and preaching in a public park at a homosexual street festival. Five of them were bound over and charged with five felonies and three misdemeanors, totaling a possible 47 years in jail. These charges, based on Pennsylvania's "hate crimes" law, hung over them for months until a judge finally dismissed them. (*The Philadelphia Inquirer*, February 13, 2005).
- In Canada, a newspaper publisher and a man who placed a newspaper ad faced jail and were fined \$4,500 each, merely for running an ad containing references to several Bible verses regarding homosexuality. (*WorldNetDaily*, February 6, 2000).
- A pastor in New York saw his billboard with a Bible verse on it taken down under pressure from city officials, who cited "hate crime" rhetoric. (*The New York Post*, March 12, 2000).

- The San Francisco Board of Supervisors approved a resolution urging local media to decline to run advertisements by pro-family groups that offered hope for change to homosexuals. A liberal court then winked at this egregious violation of the First Amendment. (*The San Francisco Examiner*, October 20, 1998).

Equal Justice:

“Equal justice under law” is one of America’s most firmly embedded legal principles. In fact, these exact words are etched in the stone above the main entrance to the U.S. Supreme Court building. The U.S. Declaration of Independence begins with the words, “We hold these truths to be self-evident, *that all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” The Fourteenth Amendment contains the “Equal Protection Clause” which provides that “no state shall... deny to any person within its jurisdiction the equal protection of the laws.”

Some conservatives may be concerned that any expansion of “hate crimes” would erode the equal justice principle and its practice in U.S. courtrooms – since violent crimes deemed motivated by the specific type of hatred defined in this bill would merit additional federal penalties and significantly more federal involvement and resources in investigating and prosecuting these crimes. The degree of justice served, and corresponding punishment for criminals, will depend on whether the victim is within one of the protected groups under this bill. Two identical violent crimes of murder – one a “random” act of violence and another “hate- motivated” act of violence – will be provided unequal treatment and unequal punishment.

Federalism:

The principle of federalism states that power not expressly provided to the federal government by the U.S. Constitution are reserved for the states. The Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As noted above, this bill would expand the federal government’s involvement in, and provide significant federal resources for, crimes otherwise under the jurisdiction of state and local governments. More specifically, the bill’s provisions would federalize each and every state and local crime, so long as there exists the possibility that the crime was motivated by “hate,” as defined under this bill. Some conservatives may be concerned by this significant federal encroachment of state laws and prerogatives.

Free Speech & Religious Liberties:

The First Amendment establishes that Congress “shall make no law... abridging the freedom of speech...”. The nature of “hate crime” legislation is to require law enforcement officials to try to ascertain the specific thoughts and motivations that a perpetrator may have had while committing a violent crime, in order to stiffen the penalty for the underlying offense. Current federal law allows an individual to be prosecuted as an “accessory” to a crime, or if the individual somehow “incited” violence. Thus, if an individual (such as a pastor or rabbi) denounced the act of homosexuality as a sin to a group of people, and one of those people committed a violent crime against a

homosexual, it is plausible that the pastor or rabbi could be charged with inciting violence or as an accessory to the crime. State hate crime laws have been used in several instances to harass, arrest, and/or silence non-violent protests, public broadcasts and media events and displays, and other instances where individuals were lawfully exercising protected First Amendment free speech privileges. Some conservatives may be concerned that empowering the federal government, and disparate state and local governments via new federal grants, to pursue “hate crimes” may have the effect of silencing or restricting free speech.

Some Amendments Rejected in Committee:

- Rooney amendment to include military personnel and veterans in protected groups.
- Gohmert amendment authorizing the use of death penalty for hate crimes.
- Gohmert amendment limiting application of hate crime bill to states with no statutes outlawing the conduct.
- Gohmert amendment to bar prosecution under the bill for any belief quoted from the Bible or Quran.
- King amendment to rename the bill, the 'Local Law Enforcement Thought Crimes Prevention Act of 2009.'
- Jordan amendment to include unborn children in groups protected by H.R. 1913.
- Goodlatte amendment to include pregnant women in protected groups.
- King amendment to replace term 'gender' with 'sex' and strike term 'gender identity.'

Committee Action: H.R. 1913 was introduced on April 2, 2009, and referred to the Committee on the Judiciary. The bill was marked-up on April 22, 2009 and it was reported (amended) to the House by a vote of 15-12 on April 27, 2009.

Outside Organizations Opposing: Hate crimes legislation is being opposed by a variety of conservative and pro-family organizations, including, but not limited to:

- Concerned Women for America*
- American Association of Christian Schools
- Family Research Council*
- Traditional Values Coalition*
- The Ethics and Religious Liberty Coalition of the Southern Baptist Convention
- Christian Coalition
- Eagle Forum*
- American Conservative Union
- Focus on the Family

** Including the vote in annual Congressional Scorecard*

Cost to Taxpayers: According to CBO, H.R. 1913 will authorize \$10 million in FY 2010 for grants to investigate and prosecute hate crimes and such sums as may be

necessary for DOJ to make grants to state, local, and tribal governments to address hate crimes committed by juveniles and such sums for FY 2009 and FY 2010 for DOJ and the Department of Treasury to investigate and prosecute hate crimes.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. As noted above, this bill creates two new federal grant programs, and expands the definition of hate crimes in federal law. In addition, the bill would make certain hate crimes new federal offenses, including crimes motivated by “sexual orientation and gender identity.” Thus, as the Judiciary Committee minority staff has noted, this bill would federalize each and every state and local crime that has the potential of being a hate crime under federal or state law.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: House Committee Report [111-086](#), cites article 1, section 8, clause 3 of the Constitution (commerce clause), and in the Thirteenth and Fourteenth Amendments to the Constitution (prohibiting slavery and equal protection).

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